

United States District Court Southern District of Texas

Case Number: H-06-1853

ATTACHMENT

Description: Memorandum of Law in support of
Plt's Motion for preliminary injunction

☐ State Court Record ☐ State Court Record Continued

☐ Administrative Record

☐ Document continued - Part 9 of 11

☐ Exhibit to: _____
number(s) / letter(s) _____

Other: _____

EX I

6001 Broken Sound Parkway, STE 200
Boca Raton, FL 33487
March 17, 2006

John C. Rawls, Esq.
Fulbright & Jaworski LLP
865 South Figueroa ST, 29th Floor
Los Angeles, CA 90017

RE: Cease and Desist Letter re Starbucks

Mr. Rawls,

We are in receipt of your letters dated January 18, 2006, February 14, 2006 regarding our alleged use of the Starbucks name in YourSmartRewards.com's promotions and ExclusiveGiftCard.com's promotions. We have more than one domain we use for promotions and you have referenced two of them.

Background

As you know, the promotions we run offer gifts to consumers who sign up for trial offers from our client sponsors. Your prior letter dealt with a gift we offered, along with comparative gifts from Dunkin Donuts, of \$250 worth of Starbucks' products through distribution of the monetary equivalent or actual gift cards if available from Starbucks or other retailers.

This is the page on which the promotion previous ran before we removed the Starbucks' name:
http://www.yoursmartrewards.com/rd_p?p=95193&t=348.

Contrary to your assertion of some kind of "breach", we did exactly as I stated and ceased use of Starbucks' name in that YourSmartRewards.com promotion. We did not make any other representations.

Email

All email sent by us is Can Spam compliant and includes the same disclaimers as are included on the landing page shown below.

The emails you submitted to me were sent by third parties. As the full technical and text header information was not provided by you. Based on the limited information you provided, as a courtesy and without waiver or admission of any kind, I forwarded our "best guess" as to who sent such emails so that you may contact such part(ies) directly.

As those emails were not sent by us, I will not respond to your allegations regarding them.

ExclusiveGiftCard.com Current Promotion

Primarily, we took particular efforts to consider your prior comments on your client's product details. For example, you will note that we have expressly stated that the cards are reloadable directly under the promotion. Additionally, we have specifically noted other relevant restrictions, as set forth on the Starbucks' website, directly under the promotion.

Secondly, we have posted an extremely prominent disclaimer, again directly under the promotion and "above the fold", stating that Starbucks is not affiliated, sponsoring or endorsing the program. The disclaimers are so prominent and lengthy that they take up almost one third of the page:

EXHIBIT

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Men's Wearhouse v.
Exclusive Gift Cards



exclusive gift cards

WAKE UP!

FREE \$250 in Starbucks® Cards

Good at Starbucks® locations or online

Use for coffee, tea, pastries, gifts, mugs, coffee makers and more

A \$250 value - Yours FREE*

Continue! »

*Starbucks Cards are reloadable cards at Starbucks.com or stores; are not accepted in Puerto Rico, Quebec, Guam and some store locations; and are subject to Starbucks' terms of use.

ExclusiveGiftCards Gift Program is not endorsed, sponsored by or affiliated with STARBUCKS® or Starbucks U.S. Brands, LLC LTD. Such terms are registered trademarks of their respective owners.

*This promotion is conducted exclusively by ExclusiveGiftCards and is subject to participation terms and conditions. Receipt of your item requires compliance with offer terms, including: age and residency requirements; registration with valid email address, shipping address and contact phone number; completion of user survey and sponsor promotions. Upon valid completion of all Program Requirements, We will ship your item to your provided shipping address. Unless otherwise indicated, participation eligibility is restricted to US residents, 18 and over. Void where prohibited.

Nominative Use

Thus, as previously stated, our use is in compliance with Nominative Use as set forth by the First, Third and Ninth Circuit courts.

Fulfillment

On March 7, 2006, as per your request, I submitted a spreadsheet showing our fulfillment as a courtesy and without waiver or admission of any kind.

Conclusion

While we respect Starbucks's concern and attention to monitoring of its trademarks, based on the information you have provided, we believe that our uses are well within the law.

If Starbucks would like to grant us a license in order to obtain possible acknowledgement of Starbucks rights and to police and control alleged uses of Starbucks marks by us in the future, we would welcome such a discussion.

Please feel free to contact me at (561) 939-6918 or jsilver@adinfocenter.com if you have further questions or concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Silver". The signature is fluid and cursive, with the first letter of the last name being a large, stylized "S".

Judith A. Silver, Esq.
Asst. General Counsel

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DECLARATION OF JOHN M. MINGS

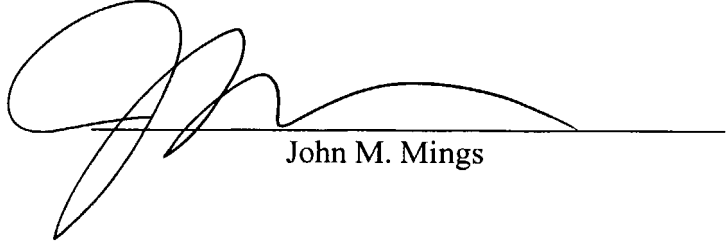
I, John Mings, declare as follows:

1. I am a partner in the law firm of Fulbright & Jaworski L.L.P., attorneys for Plaintiffs The Men's Wearhouse, Inc., TMW Marketing, Inc. (collectively, "TMW"), Starbucks Corporation and Starbucks U.S. Brands L.L.C. (collectively, "Starbucks"). I make this declaration in support of Plaintiffs' motion for a preliminary injunction against defendant Exclusive Gift Cards and its affiliates, denominated herein as John Does No. 1-10.

2. Consumers are still receiving spam emails that display and use the Starbucks Mark in the Subject line, in the text of the email and on the Web page that is linked to the email in association with Defendants' false and misleading promotions. The specific addresses (known as "URLs") contained in these spam emails change from time to time. Consumers who received these emails six months ago were directed to a "Web page" within the <exclusivegiftcards.com> and <yoursmartrewards.com> Web sites that may not exist today. Nevertheless, iterations of these misleading advertisements and promotions continue to this day on other Web pages with different URLs also owned or operated by Defendants. For example, attached hereto as **Exhibit A** is a true and correct copy of a recent spam email and a printout of the Web page that was linked to that email. The email contains the Subject line: "Brian, Get your fix at Starbucks." The text of the email contains an advertisement that displays and uses the Starbucks Mark. The text also contains a link to the URL address <http://exclusivegiftcards.com/rd_p?p=124820&c=13819-starbucks250gc_emc_d30&a=CD176>. The link connects the viewer to the attached Web page that contains an iteration of the infringing promotion. That Web page is still accessible as of today.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31st day of May, 2006, in Houston, Texas.



John M. Mings

A

-----Original Message-----

From: Caffeine Buzz [mailto:kq.lrdhdu@softvapors.com]

Sent: Wednesday, March 15, 2006 7:22 PM

To: Brian

Subject: Brian, Get your fix at Starbucks *Potential-SPAM*

[Click here to claim* \\$250 in Starbucks® Cards](#)



[Click here to claim* \\$250 in Starbucks® Cards](#)

*Starbucks Cards are reloadable cards at Starbucks.com or stores; are not accepted in Puerto Rico, Quebec, Guam and some store locations; and are subject to Starbucks' terms of use. Exclusive Gift Cards' Gift Program is not endorsed, sponsored by or affiliated with STARBUCKS® or Starbucks U.S. Brands, LLC LTD. Such terms are registered trademarks of their respective owners.

*This promotion is conducted exclusively by Exclusive Gift Cards and is subject to participation terms and conditions. Receipt of your item requires compliance with offer terms, including: age and residency requirements; registration with valid email address, shipping address and contact phone number; completion of user survey and sponsor promotions. Upon valid completion of all requirements, we will ship your item to your provided shipping address. Unless otherwise indicated, participation eligibility is restricted to U.S. residents, 18 and over. Void where prohibited. If you no longer wish to receive Exclusive Gift Cards emails, visit the unsubscribe page on the Exclusive Gift Cards site or visit the url: <http://www.exclusivegiftcards.com/suppress.htm>. Or, print a copy of this email and send it along with your request to: Exclusive Gift Cards, 13900 Jog Road Suite 203-251, Delray Beach, FL 33446.

Hi Brian! You are receiving this solicitation because btilker@yahoo.com previously agreed to receive correspondence

EXHIBIT

05/30/2006

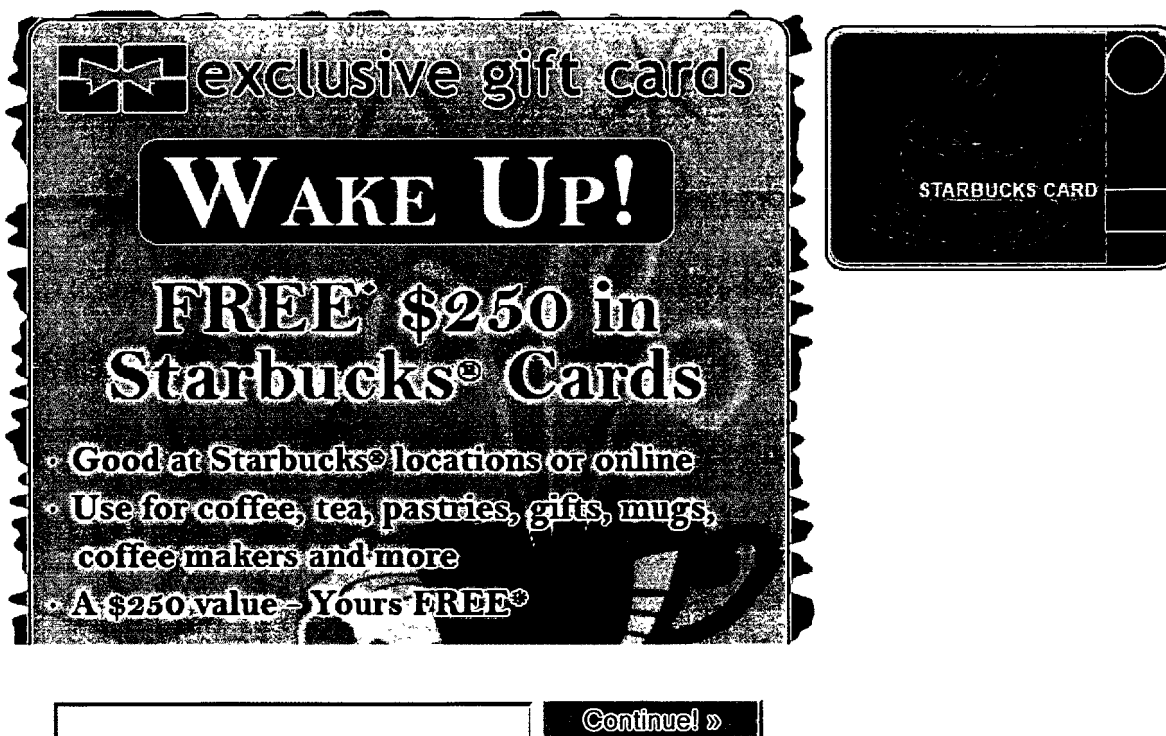
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Men's Wearhouse v.
Exclusive Gift Cards

from Atom Free. If this service should fail to meet your expectations, feel free to disassociate yourself from our service.
Should you want to contact us via the United States Postal Service, our address is as follows:

*96 Linwood Plaza # 132
Fort Lee NJ 07024*

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*Starbucks Cards are reloadable cards at Starbucks.com or stores; are not accepted in Puerto Rico, Quebec, Guam and some store locations, and are subject to Starbucks' terms of use.

ExclusiveGiftCards Gift Program is not endorsed, sponsored by or affiliated with STARBUCKS® or Starbucks U.S. Brands, LLC LTD.

Such terms are registered trademarks of their respective owners.

*This promotion is conducted exclusively by ExclusiveGiftCards and is subject to participation terms and conditions. Receipt of your item requires compliance with offer terms, including age and residency requirements; registration with valid email address, shipping address and contact phone number; completion of user survey and sponsor promotions. Upon valid completion of all Program Requirements We will ship your item to your provided shipping address. Unless otherwise indicated, participation eligibility is restricted to US residents, 18 and over. Void where prohibited.

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